

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2687-CR

Cir. Ct. No. 2011CF96

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDWARD ANDREW WOLFE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Langlade County: LEON D. STENZ, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Edward Wolfe appeals a judgment of conviction for two counts of sexual intercourse with a child over sixteen and one count of repeated sexual assault of the same child. He also appeals an order denying his

motion for postconviction relief.¹ Wolfe argues his trial counsel was ineffective for failing to move to strike a juror who was objectively biased. We agree with the circuit court that the juror was not objectively biased, and therefore affirm.

BACKGROUND

¶2 At the beginning of voir dire, the court informed the jury of Wolfe’s charges and asked if any of the prospective jurors heard or read anything about the case. One of the prospective jurors, Juror Benes, admitted her daughter and the alleged victim, S.H., were classmates and social friends. According to Benes, her daughter and S.H. were “very close” while they were in high school, her daughter spent time at S.H.’s house “and visited with this child,” and S.H. spent time at Benes’ house. When asked how often Benes sees S.H., Benes indicated she no longer sees S.H. because her daughter graduated from high school last year and is away at college.

¶3 The following exchange between the court and Benes occurred:

THE COURT: So, I am sure that you know something about the allegation about –

JUROR: First I heard of the allegations but –

THE COURT: Would it be difficult for you to be fair and impartial knowing what the allegations are in this case?

JUROR: I don’t believe so.

THE COURT: You think that you could sit here and listen to the evidence and apply the law as I give it to you?

¹ Wolfe’s appellate counsel informs us that Wolfe passed away after the postconviction hearing. “When a defendant dies pending appeal, regardless of the cause of death, the defendant’s right to an appeal continues.” *State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988).

JUROR: Yes.

THE COURT: And come up with a fair and just verdict?

JUROR: Yes.

THE COURT: The fact that you know Miss H[.], who is the victim in this case, won't impact upon that?

JUROR: No.

....

THE COURT: If the ... testimony would suggest to you that it was conflicting evidence as to what happened, the story which [the victim] may tell and the story that another witness[] may tell, would you be inclined to believe [the victim's] version of events simply because you know her and have had a relationship with her?

THE JUROR: I don't believe so, no.

¶4 Wolfe's trial counsel did not move to strike Benes for cause or use one of his peremptory challenges to remove her. She served on the jury.

¶5 At trial, S.H. testified she was in a relationship with Wolfe. She stated she had intercourse with Wolfe more than ten times when she was fifteen and at least twice after she turned sixteen. S.H. testified she got pregnant around her sixteenth birthday. After the baby was born, S.H. lied about who the father was and told police it could have been a couple of different people in order to protect Wolfe. After her relationship with Wolfe ended, S.H. went to the police.

¶6 Wolfe testified he only had intercourse with S.H. once after she turned sixteen. He suspected S.H. was lying because she was upset that Wolfe's current girlfriend, whom he lived with, was pregnant. Wolfe admitted he was the father of S.H.'s child.

¶7 The jury found Wolfe guilty of two counts of sexual assault of a child over sixteen and one count of repeated sexual assault of a child. Wolfe filed a postconviction motion, alleging in part his trial counsel was ineffective because his attorney failed to move to strike Benes, whom he asserted was objectively biased.

¶8 At the *Machner*² hearing, Wolfe’s trial counsel recalled that one of the potential jurors stated her daughter was close friends with S.H. Counsel admitted he did not move to strike the juror for cause. Counsel could not “recall exactly” why he did not “bring up objective bias.” However, he did not believe that “simply being known by [Benes] would be enough for objective bias.” Counsel also emphasized the defense at trial was not “that the sexual act didn’t occur, just as far as the timing of it” and he attempted to “create doubt as to the felony charge.” Counsel stated he did not use one of his preemptory challenges to remove Benes because he wanted women on the jury. He explained, “[I]t has been my experience that females, particularly older females, hold teenage female victims in these cases to a higher standard of credibility.”

¶9 The circuit court concluded that Benes was not objectively biased. The court noted that it was Benes’ daughter who was friends with and had sufficient contact with S.H. The court reasoned Benes was simply the mother of a friend of the victim—the “only thing that I can discern from [Benes’] answer is that ... she s[aw] the girl, the victim, and knew who she was and knew she had a baby.” The court also stated that “one thing that was clear is that the first [Benes] heard of the allegations was in court that day[.]” The court stated this was a

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

situation “where she wasn’t close enough to this individual, to the victim, to have even know[n] about the allegations.” It also noted that it had explained to Benes that credibility would be an issue in this case and Benes unambiguously expressed that she could be fair and impartial. The court found the relationship between S.H. and Benes was not so close or connected that a reasonable juror could not be fair and impartial.

¶10 Because the court found Benes was not objectively biased, the court concluded counsel was not deficient and therefore not ineffective for failing to move to strike the juror. The court denied Wolfe’s postconviction motion. He appeals.

DISCUSSION

¶11 To succeed on an ineffective assistance of counsel claim, Wolfe must prove his counsel’s representation was deficient and he was prejudiced by his counsel’s deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). In order to prove deficient performance, Wolfe must establish that his counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *See id.* However, there is “a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Prejudice is proven if the defendant shows “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. If a defendant fails to establish either prong of the *Strickland* test, we need not determine whether the other prong is satisfied. *See id.* at 697.

¶12 An ineffective assistance of counsel claim is a mixed question of law and fact. *Id.* at 698. We accept the circuit court’s factual findings unless they are clearly erroneous; however, the ultimate determinations of whether counsel’s performance was deficient and whether it prejudiced the defendant are questions of law we review independently. *State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999).

¶13 Wolfe argues his trial counsel was ineffective for failing to move to strike Benes, whom he asserts was objectively biased. It is a fundamental principle that a criminal defendant has the right to a trial by an impartial jury. *State v. Faucher*, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). “To be impartial, a juror must be indifferent and capable of basing his or her verdict upon the evidence developed at trial.” *Id.* There are three types of bias in examining whether a prospective juror or juror is impartial: statutory, subjective, and objective. *State v. Lindell*, 2001 WI 108, ¶¶34-36, 38, 245 Wis. 2d 689, 629 N.W.2d 223.

¶14 Central to this case is whether Benes was objectively biased.

[T]he focus of the inquiry into ‘objective bias’ is not upon the individual prospective juror’s state of mind, but rather upon whether the reasonable person in the individual prospective juror’s position could be impartial. When assessing whether a juror is objectively biased, a circuit court must consider the facts and circumstances surrounding the voir dire and the facts involved in the case. However, the emphasis of this assessment remains on the reasonable person in light of those facts and circumstances [W]hen a prospective juror is challenged on voir dire because there was some evidence demonstrating that the prospective juror had formed an opinion or prior knowledge, ... whether the juror should be removed for cause turns on whether a reasonable person in the prospective juror’s position could set aside the opinion or prior knowledge.

Faucher, 227 Wis. 2d at 718-19. We have “been very hesitant to find a category of persons is per se biased.” *Lindell*, 245 Wis. 2d 689, ¶41.

¶15 Whether a juror is objectively biased is a mixed question of fact and law. *Id.*, ¶39. The circuit court’s factual findings are upheld unless they are clearly erroneous. *Id.* Whether those facts fulfill the legal standard of objective bias is a question of law. *Id.* “Although we do not defer to a circuit court’s decision on a question of law, where the factual and legal determinations are intertwined as they are in determining objective bias, we give weight to the circuit court’s legal conclusion.” *State v. Funk*, 2011 WI 62, ¶30, 335 Wis. 2d 369, 799 N.W.2d 421. “We will reverse its conclusion only if as a matter of law a reasonable judge could not have reached such a conclusion.” *Faucher*, 227 Wis. 2d at 720-21.

¶16 Wolfe relies on *Lindell*, *Faucher*, and *State v. Gesch*, 167 Wis. 2d 660, 482 N.W.2d 99 (1992), to argue Benes was objectively biased. In *Lindell*, the court determined whether a prospective juror in a homicide case was objectively biased. *Lindell*, 245 Wis. 2d 689, ¶50. The court first emphasized the personal relationship the prospective juror, D.F., had with the victim, noting D.F. knew the victim for about twenty years, her parents knew the victim for forty-seven years, D.F. stated she was “close friends” with the victim, and she referred to the victim by his nickname. *Id.*, ¶42. The court highlighted the long-standing business relationship D.F. and her family had with the victim, noting D.F. worked at her family’s restaurant and the victim had been a long-time distributor. *Id.*, ¶43. D.F. knew the victim’s long-time companion, reporting she had seen the victim’s companion a few weeks before his death and had last seen her at the victim’s funeral. *Id.*, ¶44. D.F. also lived with her mother, attended the victim’s funeral with her mother, discussed the victim’s death with her mother, and said the

victim's death was "hard" on her mother. *Id.*, ¶45. Finally, the *Lindell* court emphasized that the record suggested D.F. had been crying during voir dire. *Id.*, ¶47.

¶17 The court reasoned that the victim had been brutally murdered and his house was torched and that it "should not expect a person in D.F.'s situation to be indifferent in judging the guilt or innocence of a person charged with committing those acts." *Id.*, ¶46. The court concluded that, based on the totality of the circumstances, a reasonable person in D.F.'s position could not have remained fair and impartial and, as a result, D.F. was objectively biased. *Id.*, ¶¶41, 50.

¶18 In *Faucher*, the court concluded a juror in a sexual assault case was objectively biased. *Faucher*, 227 Wis. 2d at 705. The juror was the former neighbor of one of the state's key witnesses—the only witness who had personally observed the defendant's inappropriate touching of the elderly victim. *Id.* at 707. The juror stated he knew the witness to be a "person of integrity" who "wouldn't lie." *Id.* at 708. On appeal, our supreme court concluded the evidence revealed that the juror had formed an opinion regarding the witness's credibility and was therefore not impartial. *Id.* at 730. The court noted that on three occasions the juror expressed a view that the witness's credibility was unimpeachable—one of which was even after he told the circuit court he could set aside his opinion. *Id.* at 732-33. The court concluded that the strength of the juror's opinion regarding the witness, coupled with the fact that the witness was crucial to the state's case, demonstrated that "a reasonable person in [the juror's] position could not set the opinion aside despite the best of intentions to do so." *Id.* at 733.

¶19 Finally, in *State v. Gesch*, 167 Wis. 2d 660, 662, 482 N.W.2d 99 (1992), one of the prospective jurors indicated he was the brother of the only police officer who was going to testify for the State. *Id.* at 663, 665. The prospective juror indicated he and his brother both lived in Madison, saw each other every month, and were on good terms. *Id.* at 664. On appeal, our supreme court concluded that, although the juror may have honestly believed he could remain impartial, a reasonable person would not remain “unaffected by the testimony of a relative by blood or marriage to the third degree[.]” *Id.* at 668. It emphasized that the officer’s testimony and his credibility played an important role in the prosecution of the defendant. *Id.* at 668-69. Accordingly, the court determined the juror was objectively biased. *Id.* at 669.

¶20 Wolfe argues that, based on these cases, Benes was objectively biased. He emphasizes the “close relationship” her daughter had with S.H. and argues “[n]o mother could completely set aside her personal feelings during a sexual assault trial where her daughter’s ‘very close’ friend is the alleged victim.” He contends she may have had personal knowledge of the victim’s credibility and may have tangentially known about the allegations in this case because she knew S.H. had a baby. Wolfe points out that the case hinged on a credibility determination between S.H. and Wolfe and he argues the relationship Benes had with S.H., combined with the importance of S.H.’s testimony, was damaging to the fairness of Wolfe’s trial. Finally, Wolfe emphasizes this was a child sexual assault case, and, as a result, the relationship Benes had with S.H. leaves significant doubt about her impartiality. He contends that no reasonable juror in Benes’ position could have been impartial.

¶21 The problem with the majority of Wolfe’s arguments is that they seem to suggest S.H. had a significant relationship with Benes. Rather, applying

the standard of review, including the deference we afford to the circuit court on the objective bias determination, we conclude it was reasonable for the court to conclude Benes was not objectively biased under the totality of the facts and circumstances. In support of its determination that a reasonable person in Benes' position could be impartial, the court emphasized that Benes' voir dire answers established that she was merely the mother of a friend of the victim. It noted the "only thing that I can discern from [Benes'] answer is that ... she s[aw] the girl, the victim, and knew who she was and knew she had a baby." The court also reasoned that nothing in the record suggested Benes had any significant relationship with S.H. or that she had any prior familiarity with the case and the allegations. Further, the court noted that despite knowing S.H., Benes maintained that she could be fair and impartial. *See Lindell*, 245 Wis. 2d 689, ¶¶39, 48 (Although "[i]t is not always enough that a prospective juror assures counsel or the court that he or she will be impartial[,] the subjective state of mind of the juror is an important consideration in the overall determination of objective bias.). Accordingly, the "relationship" Benes had with S.H. was nowhere near the twenty-year relationship in *Lindell* or the family relationship in *Gesch*. Additionally, nothing suggests that Benes believed S.H.'s credibility was unimpeachable as the juror did in *Faucher*.

¶22 Given that Benes was not objectively biased, we conclude Wolfe's trial counsel was not deficient for failing to move to strike her from the panel. As a result, Wolfe did not receive ineffective assistance of counsel. *See Strickland*, 466 U.S. at 697. Further, based on our determination that Benes was not objectively biased, we also reject Wolfe's argument that his trial counsel was deficient because he "did not have a reasonable strategy for not moving to strike the objectively biased juror."

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2011-12).

